

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SANDI R. MULLINEX,)	
)	No. CV-05-3046-CI
Plaintiff,)	
)	ORDER GRANTING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND REMANDING FOR AN IMMEDIATE
JO ANNE B. BARNHART,)	AWARD OF BENEFITS
Commissioner of Social)	
Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 17, 19) submitted for disposition without oral argument on March 20, 2006. Attorney Thomas A. Bothwell represents Plaintiff; Special Assistant United States Attorney Richard A. Morris represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 6.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and remands for an immediate award of benefits.

Plaintiff, 46-years-old at the time of the initial administrative hearing and 49-years-old at the second administrative hearing, completed high school and had past work experience as a movie projectionist and waitress. Plaintiff filed an application for Supplemental Security Income (SSI) benefits on December 17,

1 1999, alleging disability as of July 1, 1986, due to neck and back
2 pain and tendinitis in the arms. (Tr. at 14, 15.) Following a
3 denial of benefits at the initial stage and on reconsideration, a
4 hearing was held before Administrative Law Judge Verrell Dethloff
5 (ALJ). In March 2002, the ALJ denied benefits; review was denied by
6 the Appeals Council. Plaintiff filed for judicial review and the
7 parties stipulated to a remand for further administrative
8 proceedings, including consideration of medication side effects. A
9 supplemental administrative hearing was held on June 23, 2004,
10 before ALJ Ruperta Alexis. The ALJ denied benefits; the Appeals
11 Council denied review. This appeal followed. Jurisdiction is
12 appropriate pursuant to 42 U.S.C. § 405(g).

13 **ADMINISTRATIVE DECISION**

14 ALJ Alexis concluded Plaintiff had not engaged in substantial
15 gainful activity and suffered from severe impairments, including
16 fibromyalgia and status post cervical fusion, but those impairments
17 did not meet the Listings. (Tr. at 303.) Plaintiff's testimony was
18 not found fully credible. The ALJ found she had a residual capacity
19 for a full range of light work with additional limitations in
20 feeling, bending and range of motion of the head, and work which
21 does not require more than simple repetitive tasks. Based on the
22 testimony of a vocational expert, the ALJ concluded Plaintiff could
23 perform other work which exists in significant numbers in the
24 national economy, including cashier, change account clerk, and
25 telephone quote. (Tr. at 304.)

26 **ISSUES**

27 The question presented is whether there was substantial
28 evidence to support the ALJ's decision denying benefits and, if so,

1 whether that decision was based on proper legal standards.
2 Plaintiff contends the ALJ erred when she (1) improperly rejected
3 the opinions of the treating physician, Dr. Daniels; and (2) failed
4 to consider the side effects of prescribed medications; and (3)
5 failed to properly reject the Plaintiff's testimony. Finding the
6 first two issues dispositive, the court does not address the third.

7 STANDARD OF REVIEW

8 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
9 court set out the standard of review:

10 The decision of the Commissioner may be reversed only if
11 it is not supported by substantial evidence or if it is
12 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
13 1097 (9th Cir. 1999). Substantial evidence is defined as
14 being more than a mere scintilla, but less than a
15 preponderance. *Id.* at 1098. Put another way, substantial
16 evidence is such relevant evidence as a reasonable mind
17 might accept as adequate to support a conclusion.
18 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the
19 evidence is susceptible to more than one rational
20 interpretation, the court may not substitute its judgment
21 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
22 *Morgan v. Comm'r of Soc. Sec. Admin.* 169 F.3d 595, 599
(9th Cir. 1999).

23 The ALJ is responsible for determining credibility,
24 resolving conflicts in medical testimony, and resolving
25 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
26 Cir. 1995). The ALJ's determinations of law are reviewed
27 *de novo*, although deference is owed to a reasonable
28 construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

22 SEQUENTIAL PROCESS

23 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
24 requirements necessary to establish disability:

25 Under the Social Security Act, individuals who are
26 "under a disability" are eligible to receive benefits. 42
27 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
28 medically determinable physical or mental impairment"
which prevents one from engaging "in any substantial
gainful activity" and is expected to result in death or
last "for a continuous period of not less than 12 months."
42 U.S.C. § 423(d)(1)(A). Such an impairment must result

1 from "anatomical, physiological, or psychological
2 abnormalities which are demonstrable by medically
3 acceptable clinical and laboratory diagnostic techniques."
4 42 U.S.C. § 423(d)(3). The Act also provides that a
5 claimant will be eligible for benefits only if his
6 impairments "are of such severity that he is not only
7 unable to do his previous work but cannot, considering his
8 age, education and work experience, engage in any other
9 kind of substantial gainful work which exists in the
10 national economy" 42 U.S.C. § 423(d)(2)(A). Thus,
11 the definition of disability consists of both medical and
12 vocational components.

13 In evaluating whether a claimant suffers from a
14 disability, an ALJ must apply a five-step sequential
15 inquiry addressing both components of the definition,
16 until a question is answered affirmatively or negatively
17 in such a way that an ultimate determination can be made.
18 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
19 claimant bears the burden of proving that [s]he is
20 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
21 1999). This requires the presentation of "complete and
22 detailed objective medical reports of h[is] condition from
23 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
24 404.1512(a)-(b), 404.1513(d)).

25 ANALYSIS

26 Plaintiff contends the ALJ improperly rejected the opinions of
27 the treating physician in favor of the opinion of the consulting
28 physician under the "clear and convincing" standard. Plaintiff
relies on the opinion of Dr. David Daniels, who treated Plaintiff
for ten years or longer as reflected in the 106 pages of records,
chart notes and evaluations. Dr. Daniels also opined Plaintiff was
disabled based on limitations resulting from pain and fatigue
associated with fibromyalgia, cervical disc disease and depression.
(Tr. at 154, 166, 260.) Defendant responds the ALJ correctly
rejected the findings by Dr. Daniels as they were inconsistent with
his chart notes and were based in part on Plaintiff's subjective
report.

27 In a disability proceeding, the treating physician's opinion is
28 given special weight because of his familiarity with the claimant

1 and his physical condition. See *Fair v. Bowen*, 885 F.2d 597, 604-05
2 (9th Cir. 1989). If the treating physician's opinions are not
3 contradicted, they can be rejected only with "clear and convincing"
4 reasons. See *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). If
5 contradicted, the ALJ may reject the opinion if he states specific,
6 legitimate reasons that are supported by substantial evidence. See
7 *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463
8 (9th Cir. 1995); *Fair*, 885 F.2d at 605. While a treating
9 physician's uncontradicted medical opinion will not receive
10 "controlling weight" unless it is "well-supported by medically
11 acceptable clinical and laboratory diagnostic techniques," Social
12 Security Ruling 96-2p, it can nonetheless be rejected only for
13 "'clear and convincing' reasons supported by substantial evidence in
14 the record." *Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th Cir.
15 2001) (quoting *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir.
16 1998)). Furthermore, a treating physician's opinion "on the
17 ultimate issue of disability" must itself be credited if
18 uncontroverted and supported by medically accepted diagnostic
19 techniques, unless it is rejected with clear and convincing reasons.
20 *Holohan*, 246 F.3d at 1202-03. Historically, the courts have
21 recognized conflicting medical evidence, the absence of regular
22 medical treatment during the alleged period of disability, and the
23 lack of medical support a doctor's report based substantially on a
24 claimant's subjective complaints of pain, as specific, legitimate
25 reasons for disregarding the treating physician's opinion. See
26 *Flaten*, 44 F.3d at 1463-64; *Fair*, 885 F.2d at 604. Here, it is
27 undisputed Plaintiff suffers from residuals post-cervical surgery,
28 degenerative disk disease at L4-5, L5-S1, and fibromyalgia. These

1 findings are supported by objective tests, (MRI findings and the
2 presence of pain bilaterally at 18 trigger points). (Tr. at 221,
3 228, 257, 274, 325.) Thus, the ALJ was required to reject Dr.
4 Daniel's opinion with clear and convincing evidence.

5 In her opinion, the ALJ made the following comments with
6 respect to Dr. Daniels' opinion:

7 Neither treating doctor has restricted the claimant's
8 activities to the degree that she alleges. . . .

9 In accordance with Social Security Ruling 96-2p, I have
10 evaluated medical opinions concerning when treating source
11 medical opinions are entitled to controlling weight.
12 Controlling weight may be given, only in appropriate
13 circumstances, to medical opinions. In this case, at
14 Exhibits 25F and AC-2/1-4, Dr. Daniels opined that the
15 claimant was not even capable of performing sedentary work
16 on a part time basis due to fibromyalgia and cervical disc
17 disease. The claimant has pain essentially controlled
18 with medications. Since the neck surgery, she has only
19 required conservative management. There is no indication
20 that she requires more aggressive treatment such as
21 additional surgery or treatment at a pain management
22 clinic. She alleges significant problems related to
anxiety and depression but has not even been referred to
a mental health clinic. The severity of limitations
assessed by Dr. Daniels is not supported by any chart
notes and inconsistent with the claimant's description of
daily activities. I also considered Dr. Daniel's opinion
at Exhibit 21F and afford it no weight as the opinion is
based on the claimant's analysis of her employability and
not her treating physicians. The objective evidence
simply does not substantiate her allegation that her
"spine does not let her move around to a job." I find
that Dr. Daniel's opinion is not well supported and
inconsistent with the other substantial evidence in the
case record; therefore, controlling weight is not given to
his opinion as a treating source.

23 (Tr. at 301.)

24 The ALJ stated Dr. Daniel's opinion of full disability was not
25 supported by chart notes and was inconsistent with the report of
26 Plaintiff's daily activities. Plaintiff was treated surgically for
27 her cervical condition in March 2000 by neurosurgeon Dr. Michael
28 Thomas. (Tr. at 172.) Her cervical condition resolved immediately

1 following, but flared again May 2000. (Tr. at 221.) Physical
2 therapy assisted and Plaintiff was released from Dr. Thomas' care.
3 She returned to him for consultation in June 2000 complaining of
4 left lower extremity pain and weakness in her left foot. (Tr. at
5 221.) Dr. Thomas' interpreted an MRI to indicate a herniated disk
6 at L4-5 compressing the nerve at L-5. (Tr. at 237.) Plaintiff
7 advised she wished to try additional physical therapy before
8 considering surgery. Vicoden and Tylenol were used for pain
9 control. Dr. Daniels at this time opined Plaintiff was disabled
10 because she was unable to sit, stand or walk for any length of time
11 and would remain so until her back condition resolved. (Tr. at
12 264.)

13 In February 2001, Dr. Thomas advised Plaintiff's condition was
14 not amenable to surgery and suggested her symptoms were due to
15 fibromyalgia. (Tr. at 274.) Dr. Daniels concurred with the
16 diagnosis that same month. (Tr. at 257.) He reiterated in March
17 2001 that Plaintiff was unable to work. (Tr. at 255.) In May 2001,
18 Plaintiff reported she was suffering from severe pain after washing
19 the car and mowing the lawn. (Tr. at 252.) Her pain was not
20 responding to medication; the prescription was increased to 100 mg
21 of MS Contin along with Vicoden and neurontin. (Tr. at 252.)
22 Morphine was added to the mix during the summer of 2001. (Tr. at
23 266.) In November 2001, Dr. Daniels noted Plaintiff was permanently
24 disabled due to the pain and fatigue caused by fibromyalgia. The
25 use of Morphine and Vicoden, begun in 2001, continued through 2002,
26 2003 and 2004; the cocktail made her pain bearable but did not
27 restore her ability to function. (Tr. at 265.) In 2002, Dr.
28 Daniels charted multiple trigger points, bilateral, all 18 points.

(Tr. at 355.) In March 2003, Dr. Daniels noted the fibromyalgia was severe and documented by multiple trigger points through the trunk, arms, and lumbar spine. (Tr. at 325.) Although the ALJ relied on conservative treatment, it is noted fibromyalgia is not an impairment susceptible to surgical treatment. Additionally, Plaintiff was treated with a narcotic pain cocktail that required adjustment as the condition progressed. Finally, the ALJ did not consider all of the side effects of the pain medication, including chronic fatigue. Thus, the ALJ's finding Dr. Daniels' opinion was inconsistent with his chart notes is not supported by the medical record, and the opinion is entitled to be credited as a matter of law. *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). The ALJ also concluded Plaintiff's daily activities were not consistent with disability, noting Plaintiff did housework, including laundry, cooking, shopping for groceries; drove; ran errands; did minor yard work and cared for three dogs. (Tr. at 300.) However, the testimony also indicated Plaintiff did those activities with increased accommodation as the years passed: her daughter assisted with shopping, she did housework in short bursts (as described in 1999 prior to the onset of fibromyalgia and low back pain with reduced activities described in 2000), and complained of severe pain after washing the car and mowing a small yard. (Tr. at 110, 140, 252.) She was able to feed her dogs without lifting heavy bags of dog food and drove only short distances. (Tr. at 379, 384-389, 396, 399.) "The mere fact that a plaintiff has carried on certain daily activities . . . does not in any way detract from h[is] credibility as to h[is] overall disability." *Benecke v. Barnhart*, 379 F.3d 587, 594 (9th Cir. 2004), quoting *Vertigan v. Halter*, 260 F.3d 1044, 1050

1 (9th Cir. 2001).

2 Case law requires an immediate award of benefits when "(1) the
3 ALJ has failed to provide legally sufficient reasons for rejecting
4 [a medical opinion], (2) there are no outstanding issues that must
5 be resolved before a determination of disability can be made, and
6 (3) it is clear from the record that the ALJ would be required to
7 find the claimant disabled were such evidence credited." *Harman v.*
8 *Apfel*, 211 F.3d 1172, 1178 (9th Cir.), *cert. denied*, 531 U.S. 1038
9 (2000), citing *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996).
10 The court has some flexibility in determining whether to remand for
11 an immediate award of benefits or for additional administrative
12 proceedings. *Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003).
13 Here, the record is complete and no purpose would be served by
14 remand. Accordingly,

15 **IT IS ORDERED:**

16 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 17**) is
17 **GRANTED**; the captioned matter is remanded for an immediate award of
18 benefits.

19 2. Defendant's Motion for Summary Judgment dismissal (**Ct.**
20 **Rec. 19**) is **DENIED**.

21 3. Any application for attorney fees shall be made by
22 separate motion.

23 4. The District Court Executive is directed to file this
24 Order and provide a copy to counsel for Plaintiff and Defendant.
25 The file shall be **CLOSED** and judgment entered for Plaintiff.

26 DATED March 24, 2006.

27
28 NTHIA IMBROGNO

UNITED STATES MAGISTRATE JUDGE

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND REMANDING
FOR AN IMMEDIATE AWARD OF BENEFITS - 9